SUPREME COURT, U.S.
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In the

Supreme Court of the United States

No. 523

WINN-DIXIE STORES, INC.,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CITATIONS

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Cases:

1. *American Oil Co.*, 151 N.L.R.B. 421 (1965)
2. *Brown Transport Corp.*, 140 N.L.R.B 954 (1963)
3. *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U. S. 203 (1964)
4. *Jays Foods v. N.L.R.B.*, 292 F. 2d 317 (7th Cir. 1961)

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5. *N.L.R.B. v. Adams Dairy, Inc.*, 350 F. 2d 108 (8th Cir. 1965), cert. den. 382 U. S. 1011 (1966)
6. *N.L.R.B. v. American Manufacturing Co. of Texas*, 351 F. 2d 74 (5th Cir. 1965)
7. *N.L.R.B. v. Burns International Detective Agency*, 346 F. 2d 897 (8th Cir. 1965)
8. *N.L.R.B. v. Darlington Mfg. Co.*, 380 U. S. 263 (1965)
9. *N.L.R.B. v. J. M. Lassing*, 284 F. 2d 781 (6th Cir. 1960)
10. *N.L.R.B. v. Royal Plating & Polishing Co. Inc.*, 350 F. 2d 191 (3rd Cir. 1965)
11. *Renton News Record*, 136 N.L.R.B. 1294 (1962)
12. *Shell Oil Co. (Detroit, Michigan)*, 149 N.L.R.B. 305 (1964)

Statutes:

National Labor Relations Act, as amended, (61 Stat. 136, 29 U.S.C. 151 *et seq.*) (hereinafter called the Act):

Section 8 (d)

In the

Supreme Court of the United States

No.

WINN-DIXIE STORES, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Winn - Dixie Stores, Inc., by and through its undersigned counsel, petition for a Writ of Certiorari to review the judgment of the Court of Appeals for the Fifth Circuit entered in this case May 19, 1966.

OPINIONS BELOW

The decision of the Court of Appeals (Attached hereto as Appendix A) is reported at 62 L.R.R.M. 2218, 53 LC ¶ 11, 243 (not yet reported in official reports). The judgment of the Court of Appeals is at-

tached hereto as Appendix B. The findings of fact, conclusions of law and order of the Board are reported at 147 N.R.L.B. 788, 56 L.R.R.M. 1266, 1964 CCH N.L.R.B. ¶ 13, 210, and are in the Transcript of Record, Volume I, pp. 70 and 28.

JURISDICTION

The judgment of the Court of Appeals was entered on May 19, 1966. (*infra*, p. 22) The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and Section 10 (e) of the National Labor Relations Act, as amended, 29 U.S.C. 160(e).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erroneously interpreted the Supreme Court's decision in *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U. S. 203 (1964), in holding that Petitioner had a duty to bargain with its employees' bargaining representative about Petitioner's decision to completely discontinue its cheese processing operation, such decision having been found by the Court to have been based solely on economic considerations.

2. Whether the decision by the Fifth Circuit Court of Appeals herein is in direct conflict with the decision of the Eighth Circuit Court of Appeals in *N.L.R.B. v. Adams Dairy, Inc.*, 350 F. 2d 108 (8th Cir. 1965), cert. denied, 382 U. S. 1011 (1966), and *N.L.R.B. v. Burns International Detective Agency*, 346 F. 2d 897 (8th Cir. 1965), and the decision of the Third Circuit Court of Appeals in *N.L.R.B. v. Royal Plating and Polishing Co. Inc.*, 350 F. 2d 191 (1965).

3. Whether the closing down of an entire segment of a corporation's operation for purely economic rea-

sons is a decision which must first be bargained about with the employees' bargaining representative under section 8(d) of the N.L.R.A. as being an issue regarding . . . "wages, hours, and other terms and conditions of employment".

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are as follows:

Sec. 8

* * *

"(d)

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ."

STATEMENT OF THE CASE

1. The Board's Findings of Fact

The facts in this case are relatively simple and uncontroverted, the real issue being the legal ramifications stemming from the facts.

Winn-Dixie Stores, Inc. is a Florida corporation which owns and operates a multistate chain of retail food stores. The Company is divided into 8 divisions,

each of which is a complete operational unit performing all buying, selling, and warehousing functions in connection with the operation of the retail stores within each division. The Jacksonville Division consists of 95 retail stores, and at the time of this case, was headed by J. Wirtz Nease, a vice president of the Company.

In January of 1961, Nease initiated a plan of cutting and wrapping cheese for all of the stores at the central warehouse in Jacksonville. It was reported at a meeting in October, 1962, that all of the Company's divisions, except Jacksonville, were handling prepackaged cheese rather than packaging the cheese themselves. At this time Nease decided to try out a similar plan and about March 15, 1963, his buyer placed a small order for prepackaged cheese with Kraft Food Company. From this experiment he found that it was far more economical to purchase prepackaged cheese from processors than for the Division to package the cheese itself.

Furthermore, the prepackaged cheese was all center cut and quality controlled by a special patented inert gas sealing process. This helped eliminate mold conditions and gave the product a shelf life of 60 days, in contrast to the 10 or 12 day shelf-life for cheese packaged by the Company at the warehouse. Likewise, it was discovered that buying prepackaged cheese resulted in a cost savings of two-cents a pound.

It was thereafter determined that the Company would have to invest great sums of capital in order to establish an operation which would enable it to enjoy the same economic advantage and product quality which could be received by purchasing the prepackaged cheese from Kraft. This was true because the Company would have had to purchase a similar inert gas sealing process, hire technically qualified persons

for its operations, construct an area exclusively for cheese packaging, and incorporate in this new area certain other devices to insure product quality.

Therefore, the Company had to choose from among the available alternatives and either: 1) continue the old operation which had been proven to be unsatisfactory, both as to cost and quality; 2) invest large sums of capital in new machinery and construction in order to provide a satisfactory operation; or 3) discontinue entirely the packaging operation and purchase the cheese in a prepackaged form, thus combining the benefits of increased quality and decreased costs without the necessity of allocating large sums of capital. As the record indicates, the Company determined that the most favorable alternative was to discontinue the cheese packaging operation entirely and buy the cheese in prepackaged form directly from the processor. The Trial Examiner, the Board, and the Court of Appeals found that this decision was made for bona fide economic reasons only and that there was no evidence that the decision was motivated in the slightest by any anti-union animus.

The main issue which the Board had to determine was whether the Company was duty bound under Section 8 (d) to bargain with the union[1] regarding its decision to discontinue the cheese operation. The Company maintained that this was completely a management decision and not one which it had to first bargain about with the union.

In his Decision[2] issued on December 4, 1963, Trial Examiner Reeves R. Hilton found that the Company

[1] Meat Cutters, Packing House and Allied Food Workers Union, Local 433, Amalgamated Meat Cutters and Butcher Workmen of America, AFL-CIO.

[2] 12-CA-2653, reported at 147 N.L.R.B. 795; Transcript of Record, Volume I, p. 28.

had been under a duty to bargain with the union before reaching the decision to close the cheese operation, but since he also found that that decision was lawfully motivated, it would serve no purpose at that late date to require, in his remedy, that the Company now bargain about it. Accordingly, he found the Company guilty of a violation of Section 8 (a) (5) and (1) of the Act and recommended as his remedy that, among other things, the Company be required to bargain with the union concerning the *effects* of the discontinuance of the cheese packaging operation on the employees concerned.

In framing his remedy, Trial Examiner Hilton discussed the possibilities of directing the Company to reinstate the operation and the displaced employees, with back pay. His decision not to require this was based *largely* on the fact that there was no question but that the Company's initial decision had been based on purely economic considerations and on the fact that such method of operation "may now be [completely] outmoded" (147 N.L.R.B. at 791).

2. The Board's Conclusions and Order

On review of the facts and the Trial Examiner's Decision, the Board reached its conclusions and issued its Decision and Order[3] on June 26, 1964.

In its Decision the Board concurred with the Trial Examiner that the Company had violated Section 8(a)(5) and (1) of the Act by not bargaining with the union regarding its economic decision to close the cheese packaging operation. However, as to the appropriate remedy, the Board differed with the Trial Ex-

[3] D-6108, reported at 147 N.L.R.B. 788; Transcript of Record, Volume I, p. 70.

aminer and ordered that the Company bargain with the union regarding the possible resumption of the cheese operation as well as about the effects of the discontinuance on the involved employees; the Board ordered also that the Company pay the discharged employees back pay from the date of their discharge to the date the company fulfilled its bargaining obligation as set forth in its order.

3. The Decision of the Court Below

Jurisdiction of the lower court was based on Section 10 (e) of the Act. The Court of Appeals for the Fifth Circuit in a split decision affirmed the Board's decision as to the Company's duty to bargain with the union regarding the discontinuance of the cheese packaging operation. The Court's Order of enforcement differed from the Board's only in that it said that any bargaining concerning whether the operation should be re-established would be a mere "exercise of futility". The Court ordered that the Company bargain with the union only regarding the effect of the discontinuance, and make the employees whole for any loss of pay.

In reaching its decision regarding the Company's duty to bargain, a majority of the Court relied exclusively on its earlier decision in *N.L.R.B. v. American Manufacturing Company of Texas*, 351 F. 2d 74 (5th Cir. 1965), in which it first interpreted the decision of *Fibreboard Paper Products Corp. v. N.L.R.B., supra.* The portion of the *American Manufacturing* holding which the court quoted and upon which it based its decision in the instant case is set out below.

> "Of course it is now clear that the Board was correct in finding that the Employer must negotiate the decision to subcontract. Quite apart from anti-union

conduct, or here the claim of economic justification, the decision to subcontract work is a subject for mandatory bargaining". (351 F. 2d at 80)

The Court after this quote in *American Manufacturing* went on to cite *Fibreboard* for the above proposition. Thus the split decision in the instant case clearly rests upon the Fifth Circuit's interpretation of the Supreme Court's decision in *Fibreboard*.

ARGUMENT

As the Supreme Court is undoubtedly well aware, its decision in *Fibreboard Paper Products Corp. v. N.L.R.B., supra,* has become a landmark decision in the area of defining mandatory bargaining issues under Section 8 (d) of the Act. This important area of conflict within the labor relations field and the interpretation of the National Labor Relations Act in this regard runs to the very core of the philosophy of the Act itself. On the one hand, too restrictive an interpretation of the Section 8(d) obligation to ". . . confer in good faith with respect to wages, hours, and other terms and conditions of employment" would not grant the employee's bargaining agent enough authority to be an effective representative of the employees, while on the other hand, too broad an interpretation would completely ham-string the power of management to make its decision regarding the economic welfare and overall direction of the enterprise.

Petitioner would like to call the Court's attention to the fact that the Board, on every possible occasion, refers to management's duty to bargain with the union as existing over any decision which "affects" wages, hours, terms and conditions of employment. Petitioner is certain that the Board is doing everything in its power

to obtain a ruling by this and other Courts that such is the law. However, the Act only requires that management "confer in good faith with respect to wages, hours, and other terms and conditions of employment". It does not require management to bargain regarding any decision which merely "affects" wages, hours, etc. Certainly it is common knowledge that virtually every decision made by management which affects the destiny of the corporation will indirectly affect some "term or condition of employment" of that corporation's employees. Thus, following the argument of those who would broaden the meaning of Section 8(d) to its ultimate logical conclusion would mean that management would have to schedule a meeting and bargain with the union before making any decision whatsoever. A situation as outlined above would inevitably result in a complete breakdown of the efficiency of American business and surely was not contemplated by Congress when it passed the Act nor this Court when it decided *Fibreboard*. Yet, this is precisely the theory that the Board seems to be espousing, and which some of the Circuit Courts of Appeals, particularly the Fifth Circuit, are beginning to accept. Although both the majority and concurring opinions in *Fibreboard* emphatically underscored the narrowness of the decision to the facts presented, this case has increasingly become the hook upon which such an expansive interpretation of the 8(d) bargaining obligation has been hung.

Therefore, it is of crucial importance for this Court to again speak on the question of the scope of the Section 8(d) mandatory bargaining obligations of management. This entire area has been thoroughly confused since *Fibreboard*, and has left the circuits in

hopeless conflict. While *Fibreboard* gave this Court a chance to illustrate at least "how far" the 8(d) obligation extended, the Court has not had an opportunity to define the limitations of this Section by deciding a case which illustrates how far the obligation "does not go". Petitioner submits that such an illustration must be provided by this Court if the confusion is to cease, and that the instant case provides an excellent vehicle for such an examination.

I. Fifth Circuit Misconstrues Fibreboard

As shown by the quotation from *American Manufacturing* (page 7 above) which the Fifth Circuit Court of Appeals used as a basis for deciding the instant case, that Court has construed *Fibreboard* to stand for the proposition that *all* decisions to subcontract or to go out of business are subjects of mandatory bargaining. This conclusion is made by the Fifth Circuit Court of Appeals based wholly on *Fibreboard* despite the fact the Supreme Court clearly said in *Fibreboard* that:

> "We are thus not expanding the scope of mandatory bargaining to hold, as we do now, that the type of 'contracting out' involved in this case — the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment — is a statutory subject of collective bargaining under § 8 (d). Our decision need not and does not encompass other forms of 'contracting out' or 'subcontracting' which arise daily in our complex economy." 379 U. S. at 215.

Furthermore, the activity involved in the instant case was not subcontracting at all but rather the complete closing down of an operation. It did not involve

the substitution of an independant contractor to provide the same work on the Company's premises and under the Company's ultimate authority as in *Fibreboard*. What happened in the instant case is that the Company found it significantly more profitable to buy the product prewrapped from the supplier as all the Company's other divisions did. In this situation the Company no longer maintains any responsibility for, nor any control whatsoever over the cheese packaging activity.

In fact, the instant case involves a complete closing down of an economic activity rather than subcontracting, and should therefore be governed by the principles of this Court's decision in *Darlington Manufacturing Co.*, 380 U. S. 263 (1965). The *Darlington* case clearly stands for the proposition that even a partial closing of a business is not an unfair labor practice in the absence of a showing of anti-union motivation prohibited by the Act. Although the *Darlington* case involved the closing down of an entire plant, and Winn-Dixie continues to utilize that warehouse for other operations, the fact remains that the *Company is no longer performing any kind of cheese packaging operation,* either at that warehouse or at any other place. Thus, Winn-Dixie has clearly gone out of the cheese packaging business just as Darlington went out of the textile business. Therefore, under *Darlington* there should not be a finding of an unfair labor practice based on the partial closing, unless it can be shown to have been motivated as in *American Manufacturing,* by an anti-union motivation. It has conclusively been shown that there was no such motivation in the instant case.

Both the Board and the Fifth Circuit Court of Appeals have tried, in total disregard of *Darlington,* to

classify the Company's "closing down" of the cheese packaging operation under the semantic heading of "subcontracting", and then, by invoking its own extended construction of the *Fibreboard* holding, find an 8(a)(5) violation on the part of the Company. The term subcontracting is a very illusive one, subject to many shades of meaning. However, the term as used in *Fibreboard* clearly referred to an activity that the Company had continued to perform, and which merely amounted to the substitution of the Company's employee with those of an independent contractor to do the same work under the same conditions, and on the same premises. In the instant case the Company completely discontinued the entire processing and packaging operation, and thereafter only handled the product as a retail sales distributor to the consumer which has always been the Company's primary economic function.

Moreover, as the evidence has proven, for the Company to have continued this operation it would have had to invest a large capital outlay in order to make the cheese packaging operation a profitable enterprise. Surely this is the type of decision which this Court specifically excluded from the reaches of *Fibreboard* when it said:

> "Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. If, as I think clear, the purpose of § 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or

which impinge only indirectly upon employment security should be excluded from the area." (379 U. S. at 223). *Concurring opinion.*

Petitioner maintains that the instant case provides a perfect example of such a "basic" management decision about which management should not have to bargain with the union.

Even if Petitioner conceded, for the sake of argument, that it had a duty to bargain with the union concerning how to mitigate the "effects" of such a decision with regard to such matters as possible transfers, severance pay, and the like, management clearly had the right to make its *initial* decision without any consultation with the union. This right belongs solely to management since the decision itself does not pertain to "terms or conditions of employment", but rather is one which involves the basic functioning and operation of the Company and only incidentally affects the conditions of employment. This case involved no anti-union animus. The Company's decision is clearly one involving a management prerogative and not a mandatory subject of bargaining. Petitioner submits that it did not violate the Section 8(a)(5) of the Act by not consulting with the union about its decision to cease the operation.

Thus, it is Petitioner's contention that in the instant case the Fifth Circuit Court of Appeals has committed two basic errors. First, it has extended the meaning of the term subcontracting to include the Company's complete closing down of an operation. And second, it has erroneously applied *Fibreboard* and *American Manufacturing* to require management to bargain about all economic business decisions.

II. Conflict Among the Circuits

Petitioner does not base his request for review solely on the conflict of the Fifth Circuit Court of Appeal's decision in the instant case with the meaning and intent of the Supreme Court in the *Fibreboard* decision. Several of the other circuit courts have examined the same questions involved in the instant case and resolved them in favor of Petitioner, in direct conflict with the Fifth Circuit Court of Appeals.

The instant case is the first one in which the Fifth Circuit Court of Appeals has clearly decided that: a management decision to close down a portion of a Company's operations, made *solely for economic reasons,* is one which must first be bargained about with the employees' representative. Although the Court's prior decision in *American Manufacturing Company of Texas, supra,* seems to stand for this same principle, there is a very great difference in the factual situation involved. In *American Manufacturing,* the Company was found to have disbanded its trucking operation in order to rid itself of the union. This illegal motivation clearly puts the Company in violation of the Act under existing and well established precedent. Therefore, any language used by the Court in that decision pertaining to the mandatory bargaining obligation of an employer concerning a purely economic decision was not necessary for the determination of the case and thus merely constituted *dicta.*

Thus, the instant case, involving a purely "economic decision" and the legal ramifications resulting therefrom in light of *Fibreboard,* was a case of first impression for the Fifth Circuit. Several other circuits have likewise been called upon to decide whether similar purely economic decisions were subjects of mandatory

bargaining in light of this Court's decision in *Fibreboard*.

The Eighth Circuit has had occasion to decide two cases involving factual situations comparable to the instant case. In both cases that Court has reached a decision which is exactly opposite to the Fifth Circuit Court of Appeals and is based for the most part on its divergent view as to the scope of the *Fibreboard* decision.

The case of *N.L.R.B. v. Burns International Detective Agency, supra,* p. 2, involved a unit of guards employed at Omaha, Nebraska. The Company had contracts to provide guard services to four customers. Since two of the customers had terminated their contracts and a third man had given notice that it was about to terminate its contract also, the Company concluded that it could no longer operate economically in the Omaha area with only the single remaining customer. It therefore terminated this contract and closed its Omaha office. The Board held that the Agency had committed an unfair labor practice by terminating this contract without first bargaining with the union about the decision.

The Eighth Circuit Court of Appeals reversed this ruling by the Board and stated its reasons why it did not feel that the *Fibreboard* situation was present, which the Board had argued almost exclusively.

> "In our present case, the employer had completely discontinued its operation at Omaha. Unlike the *Fibreboard* situation Burns is not continuing the same work at the same plant under similar conditions of employment. No form of contracting out or subcontracting is here involved. Burns for valid economic reasons has withdrawn completely from

providing any services in the Omaha area." 346 F. 2d at 901.

A case that is equally analogous to the instant case and one in which the Eighth Circuit Court of Appeals' decision is also in direct conflict with the Fifth Circuit is *N.L.R.B. v. Adams Dairy, Inc., supra*, p. 2.

In *Adams*, the Company found that its products distribution system was not operating efficiently and felt that it needed to change the operation. Thereafter for purely economic reasons Adams decided to discontinue the distributional part of its business altogether to concentrate on production. The effect of this decision was that all of the driver-salesmen were terminated and the Company thereafter sold its products through independent contractors who in turn delivered the products to the ultimate consumers. Thus, the independent contractors filled the same function that the Company's driver-salesmen had formerly provided.

The facts of this case are essentially the same as in the instant case. In both cases a company decided to completely discontinue a particular activity for purely economic reasons. Both cases reflect a definite operational change in the corporate and capital make-up of the companies involved. This is greatly different from the situation in *Fibreboard* where the same function (maintenance) was continued by the company and the only change involved the substitution of workers to come into the plant and perform exactly the same work formerly done by the company's employees.

In a very well-reasoned opinion the Eighth Circuit Court of Appeals pointed out the basic difference in the *Adams* case (which holds equally well for the instant case) that made the *Fibreboard* decision inapplicable. The court therein said:

"In *Adams Dairy* there is a change in basic operating procedure in that the dairy liquidated that part of its business handling distribution of milk products. Unlike the situation in *Fibreboard*, there was a change in the capital structure of Adams Dairy which resulted in a partial liquidation and a recoup of capital investment. To require Adams to bargain about its decision to close out the distribution end of its business would significantly abridge its freedom to manage its own affairs. Bargaining is not contemplated in this area under the history and usage of § 8(a)(5)." 350 F. 2d at 111.

It should be remembered that the *Adams Dairy* case had been before this Court and was remanded to the circuit court with explicit instructions to review its previous decision in light of *Fibreboard* decided subsequent to *Adams Dairy*. Thus, the final decision in *Adams* expressly reflects the Eighth Circuit Court's considered opinion as to the type of factual situation in which the *Fibreboard* decision does not apply. After re-examination of its initial decision in light of *Fibreboard*, the Eighth Circuit Court said:

"Accordingly, this being only a partial closing, unstimulated by union animus, having its motivation based solely in economics of operation, and not being a substitution of one set of employees for another but an entire and independent operation, we reaffirm our statements made in the original *Adams Dairy* case." 350 F. 2d at 113.

The Fifth Circuit Court of Appeals decision in the instant case is likewise in conflict with the Third Circuit Court of Appeals over the interpretation of *Fibreboard*. In the case of *N.L.R.B. v. Royal Plating &*

Polishing Co., supra, the company unilaterally closed down one of its two existing plants. The Board held that the Company had violated Section 8 (a) (5) and (1) of the Act by not first bargaining with the union representative about the decision to close. In so ruling the Board held that such a partial termination of operations is a mandatory subject of bargaining under Section 8 (d) of the Act. The *Fibreboard* decision was cited for the above proposition. The Third Circuit Court did not accept such an extension of the *Fibreboard* doctrine, and distinguished the two cases by saying:

> "In the cited case [Fibreboard] there was no change in the economic direction of the company and the same functions were to be performed by the independent contractor as were performed formerly by the Company's own employees. The decision of the management in Fibreboard involved no decision respecting commitment of capital investment." 350 F. 2d at 195.

All three of the above cases were decided subsequent to and after thorough examination of the *Fibreboard* decision. The circuit courts have long held that any decision which materially changes the operations of a corporation is purely one of management's prerogatives and not one that must be first bargained about with a union. This has been true even though these decisions have an "effect" on the terms and conditions of the workers employment. Cf. *Jays Foods v. N.L.R.B.*, 292 F. 2d 317 (7th Cir. 1961); and *N.L.R.B. v. J. M. Lassing*, 284 F 2d 781 (6th Cir. 1960).

III. N.L.R.B.'s Departure From Fibreboard

Finally, the petitioner wishes to point out just how far the Board has gone in expanding the principles of

Fibreboard to further emphasize the importance and necessity of this Court's speaking again on the subject of an employer's duty to bargain about purely economic decisions.

Ostensibly under the authority of *Fibreboard*, the Board is attempting to establish a whole new doctrine which holds that every decision that management makes which even "affects" the terms or conditions of employment is a decision which under Section 8 (d) must first be bargained about with the union representative. Although most of the circuit courts do not accept such an extension of the *Fibreboard* doctrine, the Fifth Circuit Court of Appeals is headed in that direction, as witnessed by its ruling in the instant case.

Such a doctrine followed to its logical conclusion would inevitably bring every business decision within the scope of mandatory collective bargaining, since virtually every business decision will have an "affect" either directly or indirectly on all employees of the Company.

A perfect example of the Board's pursuance of such a policy as mentioned above can be found in *Renton News Record*, 136 N.L.R.B. 1294 (1962). In this case the Board held that an employer must bargain with the union before deciding upon the purchase of new and more efficient machinery. For other examples of this trend see *Brown Transport Corporation*, 140 N.L.R.B. 954 (1963), *Shell Oil Company (Detroit, Michigan)*, 149 N.L.R.B. 305 (1964), and *American Oil Company*, 151 N.L.R.B. 421 (1965).

The doctrine urged by the Board involves a radical change in the whole system of management and our entire economic system. Such a change would logically lead to the management of business by joint company-

union committees. Surely such an extended interpretation of the Section 8 (d) bargaining obligation was never intended by Congress. Moreover, the Board's doctrine is wholly incompatible with the limiting language used by this Court in *Fibreboard,* and flies directly in the face of Justice Stewart's concurring opinion which said, in part:

> "Yet there are other areas where decisions by management may quite clearly imperil job security, or indeed terminate employment entirely. An enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such mangerial decision, which lie at the core of entrepreneurial control." 379 U. S. at 223.

Petitioner contends that in spite of the clear limitations of the Fibreboard decision, in the instant case the Board has been successful in persuading the Fifth Circuit Court of Appeals to accept this radical departure from Congressional intent. Moreover, in accepting this departure the Fifth Circuit Court completely disregarded the precedent in other circuits as set out above, and as originally argued by Petitioner before it. Thus, this departure will force corporate management to bargain over matters which historically and practically must remain exclusively under its control.

CONCLUSION

In the foregoing, Petitioner has set out three different and compelling reasons why this Court should grant Certiorari and thereby review the facts and legal conclusions involved in this case. The Petitioner has pre-

sented to the Court the erroneous applications of facts and legal precedent used by the Fifth Circuit Court of Appeals in this case; second, the conflict which exists among the circuit courts as to the extent to which the *Fibreboard* decision restricts management in making economic decisions concerning the operation of its business; and third, the dangerous trend of argument and administrative and judicial precedent which the Board has pursued under the auspices of *Fibreboard*.

For the above reasons, and particularly because of the far reaching consequences of the *Fibreboard* decision and the great degree of confusion that exists as to its meaning, as evidence by the Fifth Circuit Court of Appeals decision in the instant case, Petitioner respectfully prays that this Court grant its Petition for Certiorari. Not only will justice be served in the instant case by such a decision, but also by establishing further guidelines to define the Section 8 (d) obligation in the area of mandatory bargaining issues, this Court will greatly facilitate the administration of the Nationl Labor Relations Act by both the circuit courts of appeals, and the Board with respect to this critical provision.

Respectfully submitted,

HAMILTON & BOWDEN

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CERTIFICATE OF SERVICE

Copies served per separate certificate filled herewith.

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22433

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

WINN-DIXIE STORES, INC.,
Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board, sitting at Washington, D. C.

(May 19, 1966.)

Before PHILLIPS,* JONES and BROWN, Circuit Judges.

PHILLIPS, Circuit Judge: This is a proceeding to enforce an order of the National Labor Relations Board.[1] Winn-Dixie Stores, Inc.,[2] the respondent, owns and operates a multistate chain of public food markets. It has eight divisions. Each is a complete operational unit, performing all the functions of buying and merchandising, including warehousing. The head of each division has final authority with respect to administration and policy in his division.

*Of the Tenth Circuit, sitting by designation.

1 Hereinafter called the Board.

2 Hereinafter referred to as Winn-Dixie.

Winn-Dixie also maintains what is known as a headquarters staff, composed of specialists in the field of public market operations and merchandising, including transportation and warehousing. These specialists travel throughout Winn-Dixie territory and elsewhere, observing methods employed in Winn-Dixie stores and other like stores, carry on studies, and make recommendations to the several divisions. The division head may adopt or not adopt such recommendations.

We are here concerned only with the Jacksonville Division of Winn-Dixie, which embraces 95 stores, located in north, central, and western Florida and southern Georgia. J. W. Nease, a vice-president of Winn-Dixie, was the head of the Jacksonville Division.

In September, 1961, the Meat Cutters, Packinghouse and Allied Food Workers Union, Local 433,[3] began a drive to organize an appropriate unit of the meat processing, meat packaging and cheese packaging employees in Winn-Dixie's Jacksonville warehouse.

On October 26, 1961, the Union had obtained authorization cards from 22 of the 34 employees in that unit and on that date advised Winn-Dixie of its status as representative of the unit and requested recognition. On November 2, 1961, the Union sent Winn-Dixie a list of the names of the employees who had signed authorization cards. On November 3, 1961, Winn-Dixie advised the Union that it did not believe the Union represented a majority of the employees in the unit and refused recognition unless and until certified by the Board. Thereupon, the Union posted a list of the names of the employees who had signed cards on the bulletin board in the warehouse. Winn-Dixie supervisors urged the employees to scratch their names from the list and engaged in other unfair labor practices. That resulted in an unfair labor practice case before the Board,[4] which culminated in an order of the Board, dated October 3, 1962, directing Winn-Dixie to bargain with the Union. On March 27, 1963, the Board filed in this court its petition for enforcement of

3 Hereinafter called the Union.

4 In that proceeding the examiner found that the respondent desired to postpone, if not entirely evade, its duty to bargain with the Union and had no intention to bargain.

that order. On November 19, 1963, this court ordered enforcement of the Board's order. *Winn-Dixie Stores, Inc.*, 138 N.L.R.B. 1355, N.L.R.B. *v. Winn-Dixie Stores, Inc.*, 5 Cir., 324 F.2d 502.

Following the advent of open-air refrigeration display cases, marked changes took place in the merchandising of perishable foods, meats, cheese and like products, especially in the prepackaging of them for display and sale to the ultimate consumer.

In 1940, Winn-Dixie started packaging cheese in transparent wrappers, using cellophane, saran, or other transparent material and displaying it in open-air refrigerator display cases.

In early 1961, the Jacksonville Division, after some experimentation, began a cutting and wrapping of natural cheese operation in its warehouse at Jacksonville, to provide random-weight packaged cheese for the stores in that division. It purchased natural cheese in blocks of 40, 60, or 640 pounds, sliced it in random sizes or weights to give a customer a selection as to size of package, hand-wrapped it in plastic film carrying Winn-Dixie's label, sealed it with heat, weighed the package, and marked the weight and price on the package.

In 1962 and early 1963, the headquarters staff questioned the operation at the Jacksonville warehouse. By October, 1962, the other divisions were buying all their prepackaged random-weight natural cheese from cheese firm processors and finding it very satisfactory. After the Jacksonville Division had made an analysis and study of its warehouse operation, it decided in April, 1963, that from a cost, as well as a merchandising standpoint, it would be more advantageous to purchase prepackaged random-weight natural cheese from cheese processors. About April 12, 1963, the Jacksonville Division, for lawful business reasons, discontinued its warehouse cutting and prepackaging of cheese and thereafter procured prepackaged random-weight natural cheese from Kraft and other cheese processors. The instant case arises out of the discontinuance by Winn-Dixie of its cheese cutting and prepackaging operation in its warehouse at Jacksonville.

At the time it closed such operation, the Jacksonville Division had 10 employees in its warehouse cheese prepackaging operation. It transferred four of such employees, all men, to its beef processing operation and advised the other six employees, all females, that they were being laid off permanently. It did not advise the Union it was about to discontinue its cheese packaging operation, and neither did it discuss with the Union the closing of the operation, or whether the six employees laid off could be transferred to other jobs with Winn-Dixie. All but one of the six had theretofore worked in Winn-Dixie stores.

The six employees laid off inquired as to whether they could be transferred to other jobs and were advised if there was an opening they would be called. At the time of the hearing, they had not been offered other employment. The manager of the Jacksonville Division testified that respondent had studied the matter of suitable spots for such six employees, but had been unable to find jobs for them.

The Union representative did not discuss the matter with respondent, because he believed it would be futile to do so.

Based on charges that Winn-Dixie, at its Jacksonville Division, had failed to bargain with the Union before closing its warehouse cheese prepackaging operation, a complaint was filed against Winn-Dixie, in which it was alleged that respondent had refused to bargain with the Union as the representative of the employees in the bargaining unit, composed of the employees in the meat and cheese processing and packaging operation in the Jacksonville warehouse, and that on April 12, 1963, it had unilaterally discontinued its cheese cutting and prepackaging operation and unilaterally transferred four of its employees in such operation and terminated the employment of six of its employees in such operation.

Sliced natural cheese is a highly perishable product. It is subject to contamination by mold, rendering it unfit for food. The mold is caused by bacteria in the air, on the clothes or persons of employees, or on other things with which the cheese comes in contact.

In 1961, the Kraft Food Company constructed and has since operated a plant at Booneville, Mississippi, devoted

solely to cutting and packaging random-weight natural cheese and things incidental to such an operation.

The cheese is cured in blocks of 40, 60, or 640 pounds. They are stored in coolers where proper temperature is maintained. Before being removed to the cutting room the blocks are cleaned and any discoloration and any mold is removed. The blocks are clean and free from contamination when they enter the cutting room. The cutting room is closed and the air therein filtered and maintained at a constant temperature. Sanitary precautions are taken with respect to the employees who handle the cheese. They wear white coats. The air in the room is sprayed periodically with a solution to kill bacteria. The cheese is cut with an air operated wire cheese cutter, which operates automatically, and the cut portions are deposited on a roll of paper. The cut cheese is then hand-wrapped in transparent material. In that final operation, the interior of the package is flushed with inert gas to force out the oxygen and any mold bacteria in the package. The gas flush is a patented process. Kraft owns the patent. The result is a packaged cheese that will have a shelf life, that is, a freedom from mold, for 60 days. Kraft guarantees a 60-day shelf life.

Cutting the cheese in random weights gives a customer a wider selection with respect to the amount of cheese he purchases.

Only center cuts are used. End cuts are not packaged. Crumbs are produced when blocks of cheese are cut. Kraft utilizes the crumbs and avoids loss from crumbling.

Because of the longer shelf life, larger stocks can be carried on display shelves and understocking avoided.

Kraft placed Winn-Dixie labels on the natural cheese it prepackaged for Winn-Dixie and stamped the weight and the price fixed by Winn-Dixie on each package.

While Winn-Dixie endeavored to maintain sanitary conditions where it carried on its cutting and packaging of its natural cheese at its Jacksonville warehouse, the cheese it cut and prepackaged had a shelf life of only 10 to 12 days. As a result, its shelves at times were understocked and it suffered losses of cheese from mold. It was not able to utilize

cheese crumbs and the crumbs were a total loss. It also packaged end cuts.

At the time the Jacksonville Division discontinued its cutting and prepackaging of cheese, the price of natural cheese prepackaged by Kraft and other processors had been reduced because of growing competition among the processors, and the Jacksonville Division could purchase prepackaged cheese from Kraft at substantially less cost than the cost of the cheese purchased by the Division in blocks and prepackaged by it. Longer shelf life enabled the Division to maintain adequate stocks on its shelves without danger of loss from mold, which made for better merchandising, increased sales, and larger profits.

It was not practical or economically feasible for the Jacksonville Division, with its comparatively small operation, to install the means, processes and practices to maintain sanitary conditions in a cutting and prepackaging plant, like Kraft did in its Mississippi plant.

The trial examiner found that uncontroverted evidence established that the respondent "discontinued its cheese operation for sound business reasons, namely, the adoption of a new, better and more economical method for merchandising its prepackaged cheese products to the public, rather than any opposition to organization." The Board concurred in that finding. But the examiner found, as did the Board, that respondent violated "Section 8(a)(5) and (1) of the Act when it discontinued the cheese operation without prior notice to, or consultation with, the Union." The examiner also found that "the discharges were not violative of Section 8(a)(3)." The Board made no finding with respect to a violation of § 8(a)(3).[5]

The order of the Board contained the usual negative provisions. It did not require the reestablishment of respondent's cheese operation at the Jacksonville warehouse. It ordered that the respondent take the following affirmative action:

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5 The examiner did not recommend reestablishment of the discontinued operation or the reinstatement with back pay of the six employees whose employment was discontinued.

"(a) Offer to, and upon request, bargain collectively with, the Union concerning the resumption of its cheese processing and packaging operation, and if no agreement is reached with respect thereto, bargain collectively with the Union concerning the effects of the discontinuance of its cheese processing and packaging operation on the employees in the above-described unit.

"(b) Make Flo Heasley, Ossie Leggett, Mabel Morrison, Polly Ramsey, Evelyn Spillers, and Patricia Spires whole for any loss of pay suffered by them[6] * * *."

It also contained the usual requirements respecting the posting of notices and reporting of steps taken to comply with the order.

It will be noted that the earlier decision and order of the Board, by which it certified the Union as the bargaining agent of the employees in the unit, found Winn-Dixie had violated § 8(a)(5) of the Act by failing to bargain with the Union, and ordered it so to bargain, was entered October 3, 1962; that Winn-Dixie did not assent to such certification and refused to comply with the order to bargain; that on March 27, 1963, the Board filed its petition in this court for enforcement of that order; that this court, on December 13, 1963, handed down its decision that such order should be enforced; and that the failure to bargain, upon which the order of the Board in the instant case is based, occurred during the period the proceedings for enforcement of the earlier order were pending in this court.

Winn-Dixie contends it was under no duty to bargain with the Union during the pendency of such proceedings. Section 10(g) of the Act (29 U.S.C.A. § 160(g)) expressly provides: "The commencement of proceedings under

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[6] The order provided that the back pay liability should cease upon the occurrence of any of the following conditions: "(1) reaching mutual agreement with the Union relating to the subjects which Respondent is herein required to bargain about; (2) bargaining to a *bona fide* impasse; (3) the failure of the Union to commence negotiations within 5 days of the receipt of the Respondent's notice of its desire to bargain with the Union; (4) the failure of the Union to bargain thereafter in good faith."

subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order."[7]

We hold Winn-Dixie was not relieved of its duty to obey the order to bargain during pendency of the proceedings to enforce the earlier order.[8]

In *N.L.R.B. v. American Manufacturing Company of Texas*, 5 Cir., 351 F.2d 74, the facts were these: American was a manufacturer of oil field pumping equipment. For many years prior to 1960, it had maintained a motor truck transportation department, by means of which it delivered its products to its customers throughout the United States and Canada. On April 10, 1960, Local 47 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America[9] became the bargaining representative of the truck drivers in American's transportation department. On April 11, 1960, Local 47 notified American of that fact. On June 18, 1960, without discussion or consultation with Local 47, American posted a notice to the drivers that the transportation department was being abolished and that all of its motor truck transportation would be performed by C. & H. Transport Company, a certified, nonscheduled carrier. Two of the truck drivers accepted other tendered employment. One refused other tendered employment. All the others were laid off. Thereafter, and in September, 1960, American sold all of its trucks and related equipment. The Board found American guilty of unfair labor practices and ordered it to "(1) Resume trucking operations which had been discontinued in June 1960; (2) Offer reinstatement to all discharged drivers to their former or substantially equivalent positions; and (3) Pay drivers back pay from date of discharge * * *."

In holding the order, as modified by the court, should be enforced, the court at page 80 in part said:

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7 Subsection (e) provides for proceedings to enforce the Board's order in a court of appeals of the United States and subsection (f) for a review of a final order of the Board in such a court of appeals in behalf of any person aggrieved thereby.

8 See Old King Cole, Inc. v. N.L.R.B., 6 Cir., 260 F.2d 530, 532.

9 Hereinafter called Local 47.

> "Of course it is now clear that the Board was correct in finding that the Employer must negotiate the decision to subcontract. Quite apart from anti-union conduct, or here the claim of economic justification, the decision to subcontract work is a subject for mandatory bargaining."

In the instant case, we think when Kraft or another processor receives an order from Winn-Dixie for sliced and prepackaged natural cheese and the processor selects a block or blocks of cheese to be sliced and prepackaged in containers bearing Winn-Dixie's label, with the weight of the package to be indicated thereon and with the price as directed by Winn-Dixie to be stamped thereon, the block or blocks of cheese so selected become appropriated to the Winn-Dixie purchase contract. We think the situation is materially different from one where a processor offers and sells prepackaged natural cheese bearing the processor's label to retail purchasers generally. Had Winn-Dixie purchased blocks of natural cheese and employed a processor as an independent contractor to slice and prepackage it in packages bearing its label, with the weight and the price directed by Winn-Dixie stamped thereon, there could be no doubt the processor would be performing the same work as Winn-Dixie had theretofore performed with its own employees in its warehouse. We see no material difference in the case we have just hypothesized and the facts in the instant case, after the processor selects the block or blocks of cheese to fill a Winn-Dixie special order. Likewise, we see no material difference in the facts in the instant case and the *American Manufacturing Company* case, if, as indicated in the opinion in the latter case, anti-union conduct and economic justification may be laid aside in reaching the ultimate decision.

While there was a duty on the part of Winn-Dixie to consult and bargain with the Union as the employees' representative before discontinuing its cheese cutting and prepackaging operation at its Jacksonville warehouse, we do not think at this late date it should be required to bargain with the Union as to its reestablishment. That, because under the facts proven by uncontradicted evidence, we think

Winn-Dixie, for good and sufficient reasons, would undoubtedly refuse to reestablish such operation and that to bargain with respect to such reestablishment would be a mere "exercise in futility."[10] The order should be modified so as to eliminate that requirement.

On the authority of the *American Manufacturing Company* case, which we feel impelled to follow, the order of the Board as so modified will be enforced.

So ordered.

JONES, Circuit Judge, dissenting:

The facts, as stated by the majority, appear to me as the disclosure of a situation clearly within the exclusive prerogatives of management in all of its phases. Therefore, I DISSENT.

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[10] See N.L.R.B. v. American Manufacturing Company of Texas, 5 Cir., 351 F.2d 74, 81.

Adm. Office, U. S. Courts—E. S. Upton Printing Co., N. O., La.

APPENDIX "B"

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
WINN-DIXIE STORES, INC.,
Respondent.
No. 22433

DECREE

Before: Phillips,* Jones and Brown, Circuit Judges.

BY THE COURT:

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated June 26, 1964, directed against the above-named Respondent, Winn-Dixie Stores, Inc., its officers, agents, successors and assigns. The Court heard argument of respective counsel on March 11, 1966, and has considered the briefs and transcript of record filed in this cause. On May 19, 1966, the Court, being fully advised in the premises, handed down its opinion granting enforcement of the Board's said order as modified. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Fifth Circuit that Winn-Dixie Stores, Inc., its officers, agents, successors, and assigns, shall:

* Of the Tenth Circuit, sitting by designation

1. Cease and desist from:

(a) Refusing to bargain collectively with Meat Cutters, Packinghouse and Allied Food Workers Union, Local 433, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, as the exclusive representative of all of its employees in the appropriate unit comprising all employees in the meat and cheese processing and packaging department employed at the Respondent's warehouse in Jacksonville, Florida, with respect to wages, hours, and other terms and conditions of employment.

(b) Unilaterally subcontracting or discontinuing unit work, or otherwise unilaterally changing the wages, hours, and other terms and conditions of employment of unit employees without prior bargaining with the above-named Union concerning such decision and the affects thereof.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named Union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act, or to refrain from any and all such activities.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Offer to, and upon request, bargain collectively with, the Union concerning the effects of the discontinuance of its cheese processing and packaging operation on the employees in the above-described unit.

(b) Make Flo Heasley, Ossie Leggett, Mabel

Morrison, Polly Ramsey, Evelyn Spillers, and Patricia Spires whole for any loss of pay suffered by them in the manner and under the conditions and circumstances set forth in the section of the Board's Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board and its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other rights of reinstatements under the terms of this Decree.

(d) Post at its warehouse in Jacksonville, Florida, copies of the notice attached hereto, marked Appendix. Copies of said notice, to be furnished by the Regional Director of the National Labor Relations Board for the Twelfth Region, (Tampa, Florida) shall, after being duly signed by an official representative of the Respondent, be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by the Repondent to insure that said notice is not altered, defaced, or covered by any other material.

(e) Notify the aforesaid Regional Director in writing, within 10 days from the date of this Decree, what steps the Respondent has taken to comply herewith.

ENTERED June 10, 1966

(ORIGINAL FILED — JUNE 10, 1966)

APPENDIX

NOTICE TO ALL EMPLOYEES PURSUANT TO

A Decree of the United States Court of Appeals enforcing as modified an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively with MEAT CUTTERS, PACKINGHOUSE AND ALLIED FOOD WORKERS UNION, LOCAL 433, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, as the exclusive representative of all employees in the appropriate unit comprising all employees in the meat and cheese processing and packaging department at our warehouse in Jacksonville, Florida.

WE WILL NOT unilaterally subcontract or discontinue our cheese processing and packaging operation or otherwise unilaterally make changes in the wages, hours, and other terms and conditions of employment for the employees in the appropriate unit without prior bargaining with the aforesaid Union.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named Union, or any other labor organization, to bargain

collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act, or to refrain from any and all such activities.

WE WILL, upon request, bargain collectively with the above-named Union as the exclusive representative of all employees in the aforesaid unit with respect to the effects of our decision to discontinue our cheese processing and packaging operation.

WE WILL make Flo Heasley, Ossie Leggett, Mabel Morrison, Polly Ramsey, Evelyn Spillers, and Patricia Spires whole for any loss of pay suffered by them as a result of failure and refusal to bargain with the aforenamed Union concerning the discontinuance of our processing and packaging operation.

WINN-DIXIE STORES, INC.
(Employer)

Dated _____ by _____
(Representative) *(Title)*

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, Room 706, Federal Office Building, 500 Zack Street, Tampa, Florida 33602 (Tel. No. 228-7711), if they have any question concerning this notice or compliance with its provisions.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
WINN-DIXIE STORES, INC.,
Respondent.
No. 22433

CERTIFICATE OF SERVICE

The undersigned certifies that one copy of the Board's proposed decree in the above case has this day been served by first class mail upon the following party at the address listed below:

HAMILTON, BOWDEN & COFFMAN
ATT: O. R. T. Bowden, *Esquire*
1056 Hendricks Avenue
Jacksonville 7, Florida

/s/ MARCEL MALLET-PREVOST
MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board.

Dated at Washington, D. C.
this 31st day of May, 1966.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 523

WINN-DIXIE STORES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 22-31) is reported at 361 F. 2d 512. The Board's Decision and Order (R. 70-83, 28-54)[1] are reported at 147 NLRB 788.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1966 (Pet. 32-36). The petition for a

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[1] "R." and "J.A." references are to the Transcript of Record and Joint Appendix filed in the court below.

writ of certiorari was filed on September 6, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner violated its duty to bargain under the National Labor Relations Act when, because of economic considerations, it contracted out its cheese packaging work without first bargaining about that decision with the union representing the employees who formerly performed that work.

STATUTE INVOLVED

Section 8(d) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 158(d)), appears at page 3 of the petition.

STATEMENT

1. Petitioner, a multistate retail grocery chain, maintains a warehouse in Jacksonville, Florida, from which it services 95 stores comprising its Jacksonville Division (R. 29, 32; J.A. 97, 126).[2] The Union[3] represents the employees in the meat and cheese processing and packaging department at the Jacksonville warehouse (R. 30-31).

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[2] Petitioner's enterprise is divided into 8 divisions, each of which is a complete operational unit performing the functions of buying, merchandising and warehousing (R. 32; J.A. 97).

[3] Meat Cutters, Packinghouse and Allied Food Workers Union, Local 433, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO.

Prior to April 1963, unit employees at the warehouse prepared "random weight cheese"[4] for distribution to the various stores in the Jacksonville Division (R. 32, 34; J.A. 101). This operation entailed slicing bulk cheese (purchased from outside suppliers, primarily Kraft Food Company) into random sizes or weights, hand-wrapping it in plastic film carrying petitioner's label, sealing it with heat, weighing the package, and marking the price and weight on the package (J.A. 71-74, 93, 96, 101).

In April 1963, petitioner decided to discontinue performing its cheese processing and packaging operations with its own employees and, instead, to purchase all its random-weight cheese in prepackaged form from Kraft.[5] Accordingly, petitioner abolished the jobs of its cheese processing and packaging employees, transferring four of these employees to other jobs and permanently dismissing the remaining six (R. 33-34; J.A. 7-9, 15-25). Petitioner did not notify the Union that it was considering this step, did not consult the Union about whether to make the change, and did

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[4] This term refers to cheese pieces which are cut at random weights, and priced individually, in order to provide a wide selection for customers (J.A. 73).

[5] Petitioner ascertained, after considerable study and experimentation, that direct purchase of Kraft's prepackaged cheese would be less expensive and would increase the shelf life of the cheese, with no loss in merchandising advantages (R. 33; J.A. 106-107, 104, 101, 138). The cheese, as packaged by Kraft, bore petitioner's labels and was stamped by Kraft with the weight and price as fixed by petitioner (R. 33; J.A. 92-93, 101, 106).

not discuss with the Union the possibility of transferring the six laid-off employees (R. 33; J.A. 119, 10).[6]

2. The Board found that the petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act by effecting the changeover in its cheese processing and packaging operation without first bargaining with the Union about this decision and its effects on the unit employees (R. 71-73, 41). The Board's order (R. 75-83) directed petitioner to cease and desist from the unfair labor practice found; to bargain with the Union upon request concerning the resumption of its cheese processing and packaging operation, and, if no agreement be reached with respect thereto, to bargain with the Union concerning the effects of the changeover on the unit employees; to make the discharged employees whole for loss of pay; and to post appropriate notices.

3. The court of appeals, with one judge dissenting, affirmed the Board's unfair labor practice findings, holding that "there was a duty on the part of Winn-Dixie to consult and bargain with the Union as the employees' representative before discontinuing its cheese cutting and packaging operation" (Pet. 30). The court enforced the Board's order, except for the provision requiring petitioner to bargain with respect to the reestablishment of the cheese processing and

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[6] Although one of the employees notified the Union of the change, the Union believed it futile to ask the Company to bargain about the matter until disposition of a proceeding then pending before the court below (138 NLRB 1355, enforced 324 F. 2d 502) in which petitioner was challenging the Union's representation rights (R. 34, 39; J.A. 6-7).

packaging operation. As to that portion of the order, the court concluded that bargaining "at this late date" would be a mere "exercise in futility" (Pet. 30-31).

ARGUMENT

The decision of the Board and the court of appeals is consistent with this Court's decision in *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203, and it does not conflict with any other decision. There is, therefore, no occasion for further review.

1. In *Fibreboard*, the Court held that an employer violated his duty to bargain when he failed to negotiate with the union before contracting out maintenance work, previously done by unit employees, to an independent contractor who undertook to perform the same work with a different set of employees. The factors emphasized by this Court in arriving at that result (379 U.S. at 213) are present here. The contracting out of the cheese packaging work did not alter petitioner's basic operation; its retail stores still continued to sell packaged, random-weight cheese under its own label. The contracting out did not involve a substantial recoupment or commitment of capital investment; it merely replaced petitioner's employees with those of the contractor.[7] The decision to con-

[7] Petitioner asserts (Pet. 5) that an alternative choice would have been to emulate Kraft's processing and packaging operation, which may well have involved a substantial commitment of investment capital. But petitioner rejected this alternative, apparently because of its cost, and its decision

tract out was motivated by a desire to reduce operating costs, a matter long regarded as "peculiarly suitable for resolution within the collective bargaining framework" (379 U.S. at 214). Accordingly, the "type of contracting out" involved in this case is the same as that in *Fibreboard*, and the court below properly found it to be a statutory subject of bargaining.

2. There is no merit to petitioner's contention (Pet. 16-17) that the instant case is in conflict with the Eighth Circuit's decision in *National Labor Relations Board* v. *Adams Dairy, Inc.*, 350 F. 2d 108, certiorari denied, 382 U.S. 1011.[8] The contracting out in *Adams* involved a substantial recoupment of investment capital (350 F. 2d at 110, 111); the company retained relatively little control over and had slight contact with the product after it was placed in the contractor's hands (*id.* at 111); and the company in that case had done some bargaining about contracting out during the negotiations and had unsuccessfully sought the union's recommendation for reducing costs in its delivery operation immediately prior to its decision to contract

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to contract out the work rather than continue its previous method involved no commitment of investment capital.

[8] In *Adams*, the Eighth Circuit held that the company was not required to bargain about its decision to contract out its delivery operation. The court held, however that the company violated Section 8(a)(5) of the Act by not bargaining as to the "effects" on the unit employees of its decision to contract out unit work. See 350 F. 2d at 115, affirming the previous order in 322 F. 2d 553, 562. Cf. *National Labor Relations Board* v. *Royal Plating and Polishing Co., Inc.*, 350 F. 2d 191, 196 (C.A. 3).

out that operation (*id.* at 113).[9] None of these factors is present here.

3. Petitioner also errs in contending (Pet. 10-11) that this case involves a "complete closing down of an operation," rather than "contracting out," and should thus be governed by the principles of *Textile Workers* v. *Darlington Manufacturing Co.*, 380 U.S. 263. The Court in *Darlington* merely held that an employer did not violate Section 8(a)(3) of the Act by permanently closing a part of his business even if he was motivated by anti-union considerations, unless the "purpose and effect" of such action was to "chill unionism" in his other plants (380 U.S. at 275, 276). It did not decide whether, where such a partial closing of business is permissible, the employer might still be required to bargain with the union before taking such action (see 380 U.S. at 267, n. 5). Moreover, where, as in *Fibreboard* and here, an employer does not abandon an operation but merely hires a third party to perform the same operation for his benefit, such action cannot realistically be viewed as a partial "going out of business."

National Labor Relations Board v. *William J. Burns International Detective Agency*, 346 F. 2d 897 (C.A. 8), and *National Labor Relations Board* v. *Royal Plating and Polishing Co., Inc.*, 350 F. 2d 191 (C.A. 3), cited by petitioner (Pet. 15-18), are likewise distinguishable. In those cases there was substantial basis for concluding that the company had

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[9] The decision in the instant case was not preceded by any form of bargaining whatever. Petitioner had refused to recognize the Union at the time of its decision (R. 71).

completely shut down an operation rather than merely contracted it out.[10]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 1966

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[10] In *Burns*, the court found that the company was not required to bargain with the union prior to terminating completely, for valid economic reasons, its services in an entire geographic area. The court distinguished *Fibreboard* on the ground that "[n]o one is performing for Burns by subcontract or otherwise the services formerly rendered by its Omaha guards" (346 F. 2d at 901). Similarly, in *Royal Plating*, the court held that the company was not required to bargain before permanently closing one of its two plants, where the closing was an economic necessity (350 F. 2d at 196).

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